STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY ECKHOUT,

Plaintiff-Appellant,

v

KROGER CORPORATION,

Defendant/Third-Party Plaintiff-Appellee,

and

CHRISTOPHER RICE, d/b/a OWEN'S LANDSCAPING, and OWEN'S LANDSCAPING, INC.,

Defendant/Cross-Defendant-Appellee,

and

AMERICAN REALTY CORPORATION,

Defendant/Third-Party Defendant/Cross-Plaintiff,

and

CITY CENTER ASSOCIATES LIMITED PARTNERSHIP,

Third-Party Defendant/Cross-Plaintiff.

UNPUBLISHED
March 20, 2007

No. 267102
Wayne Circuit Court
LC No. 04-419628-NO

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff, Kimberly Eckhout ("Eckhout"), appeals by right an order granting defendant/third-party plaintiff Kroger Corporation summary disposition against third-party defendant City Center Associates Limited Partnership. On appeal, Eckhout raises issues related exclusively to a prior order granting defendant, Owen's Landscaping, Inc. ("Rice"),[1] summary disposition against Eckhout. We affirm.

This premises liability[2] action arises out of Eckhout's slip and fall accident on an icy patch of pavement in a Kroger parking lot that Rice had plowed and salted earlier in the day. Eckhout argues that the trial court should not have granted Rice summary disposition because the icy parking lot was not an open and obvious danger or, alternatively, it presented special aspects that made it unreasonably dangerous, namely, the ice was unavoidable because Eckhout slipped on the parking lot pavement upon her first step out of her car. Specifically, she claims Rice plowed snow into a pile where he knew that the snow would melt and refreeze, and he failed to inspect the parking lot as the temperature dropped.

On appeal, we review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties, in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

In a premises liability action, the plaintiff must establish the elements of negligence: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW 2d 384 (2001). The premises possessor, however, generally does not have a duty to warn or protect invitees against open and obvious dangers. *Id.*

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[1] Plaintiff, Kimberly Eckhout, originally named defendant, Christopher Rice, d/b/a Owen's Landscaping, in her complaint, but upon stipulation of the parties the complaint was amended to properly name that defendant, Owen's Landscaping, Inc.

[2] Rice argued in the lower court that he was not in possession or control of the premises, and therefore, could not be found liable under a premises liability theory. However, the lower court did not address this issue, and Eckhout did not raise the issue on appeal.

The test to determine if a danger is open and obvious is whether an average person with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). The test is objective, and therefore, courts look to whether a reasonable person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known the condition was dangerous. *Id*. at 238-239.

Eckhout distinguishes her case from *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*), in which a snow-covered icy parking lot was found to be an open and obvious hazard where the plaintiff saw other people slipping on the pavement before she stepped out of her vehicle. Eckhout claims that her case is different from *Kenny II* because the Kroger parking lot appeared to be plowed and maintained, and she did not see anyone else slipping in the parking lot before she stepped out of her vehicle. But, Eckhout fails to consider this Court's holding in *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 63; 718 NW2d 382 (2006), stating "that the potential slipperiness of a snow-covered surface is an open and obvious danger even in the absence of any separate factor suggesting that, in fact, the surface is slippery."

We are unaware of any Michigan case law holding that icy pavement, cleared of snow, is open and obvious as a matter of law. On the other hand, Judge Griffin's dissenting opinion in *Kenny v Kaatz Funeral Home*, 264 Mich App 99, 121; 689 NW2d 737 (2004) (*Kenny I*), rev'd *Kenny II*, *supra* at 929, which was adopted by our Supreme Court in *Kenny II*, states, "Snow *and ice* in Michigan parking lot on December 27 are a common, not unique, occurrence." (Emphasis added.) Analogizing to the holding of *Kenny II*, an icy parking lot in Michigan in March is also a common occurrence. Furthermore, Eckhout lived her entire life in Michigan, there was a snowstorm that morning, the temperature increased and then decreased, and she stated that the parking lot appeared wet. She also saw that the parking lot was covered in salt, which would put a reasonable person on notice that there was a potential for ice. Given these facts, to a person of ordinary intelligence making casual observations, the icy parking lot would be an open and obvious danger. Drawing all reasonable inferences in favor of Eckhout, we hold that reasonable minds would not differ in finding that the icy parking lot presented an open and obvious danger.

Alternatively, even if the condition of the parking lot was open and obvious, Eckhout argues that there were special aspects making the parking lot unreasonably dangerous. If there are special aspects of an open and obvious condition that create an unreasonable risk of harm, a premises possessor retains the duty to protect or warn an invitee regarding the danger. *Lugo*, *supra* at 517. The *Lugo* Court gave two examples of the types of dangers that constitute an unreasonable risk of harm. First, a danger that is unavoidable, creating a uniquely high likelihood of harm, such as where the only way to exit a building is through standing water, and second, a danger that poses a uniquely high severity of harm if the risk is not avoided, such as an unguarded 30-foot deep pit in the middle of a parking lot. *Id*. at 517-519.

Eckhout claims that the condition was unavoidable because she slipped upon taking the first step out of her vehicle. She analogizes her case to the facts of *Robertson v Blue Water Oil*, 268 Mich App 588; 708 NW2d 749 (2006). In *Robertson*, a gas station parking lot was uniformly covered with ice after an ice storm, causing a customer to slip and injure himself. The issue on appeal was whether the open and obvious icy condition was avoidable. *Id*. at 592. This Court held that the icy condition was unavoidable because the plaintiff was "effectively trapped,"

since he was out of windshield washer fluid, and "it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid." *Id*. at 594. In addition, the entire gas station parking lot was covered in ice, so there was no safe alternative route that the plaintiff could have taken to get into the store. *Id*. at 593-594.[3]

The *Robertson* plaintiff was purchasing a product that was necessary for his safety, and the entire parking lot was covered in ice. Here, Eckhout was going into Kroger to buy a sandwich. In addition, Eckhout testified that the parking lot was icy in only a ten-foot radius from where she parked. There were other cars parked elsewhere in the lot and customers were safely exiting the store. Consequently, Eckhout was not "effectively trapped" like the plaintiff in *Robertson*.

Furthermore, Judge Griffin's dissenting opinion in *Kenny I*, *supra* at 121, which was adopted by the Supreme Court in *Kenny II*, stated, "Snow and ice in a Michigan parking lot on December 27 are a common, not unique, occurrence. Under the *Lugo* definition of 'special aspects,' ice and snow do not present 'a *uniquely high* likelihood of harm or severity of harm." (Citation omitted.) Analogizing to the holding of *Kenny II*, an icy parking lot in Michigan during March is generally avoidable. Accordingly, the icy parking lot was not the type of condition that created a uniquely high likelihood of harm or severity of harm such as that contemplated by the *Lugo* Court. Drawing all inferences in favor of Eckhout, we conclude that reasonable minds would not differ in finding that there were no special aspects making the icy parking lot unreasonably dangerous.

We affirm.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ William B. Murphy

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[3] In addition, the defendant gas station manager had knowledge of the icy condition at his gas station yet failed to remedy it. *Robertson*, *supra* at 590-591. The sole store employee called the defendant at home at 2:00 a.m. to tell him about the icy conditions, and the defendant said he would call a contractor to come and put salt down, but then the defendant just went back to sleep without making the call. *Id*.